Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TOM BLAKENEY, MICHAEL BLOHM, ROBERT S. HUFFER, ERIN PHELPS, JAMES RUSKA, LINN MADSEN, KATHY HOWELL, and MIKE SWEET,

Petitioners,

v.

LOMAS INFORMATION SYSTEMS, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

I. Whether a total failure to comply with any of the statutory requirements of the Older Worker's Benefit Protection Act ("OWBPA") can be cured by the doctrine of ratification?

II. Whether a failure to return the consideration received in exchange for a release is a total bar to recovery for age discrimination (as determined by the Fifth Circuit) or, is the amount received merely an offset to any damages awarded (as determined by the Seventh Circuit)?

III. Whether discrimination claims, which have not yet arisen, can be waived in advance of their occurrence by the employees' signing of a release of such claims?

LIST OF PARTIES TO THE PROCEEDING

TOM BLAKENEY
MICHAEL BLOHM
ROBERT S. HUFFER
ERIN PHELPS
JAMES RUSKA
LINN MADSEN
KATHY HOWELL
MIKE SWEET,

LOMAS INFORMATION SYSTEMS, INC.

RELATED LOMAS COMPANIES:

LOMAS FINANCIAL CORPORATION
LOMAS MORTGAGE USA, INC.
LOMAS ADMINISTRATIVE SERVICES, INC.

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Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Tom Blakeney, Michael Blohm, Robert S. Huffer, Erin Phelps, James Ruska, Linn Madsen, Kathy Howell and Mike Sweet, respectfully pray that a Writ of Certiorari issue to review the judgment of the

United States Court of Appeals for the Fifth Circuit entered on October 4, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 65 F.3d 482 (5th Cir. 1995) and is reproduced in the Appendix at page A-1. The Opinion of the District Court is reported at 879 F.Supp. 645 (N.D. Tex. 1995) and is reproduced in the Appendix at page A-7.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

OWBPA. 29 USC §626(f) provides as follows:

"(f) Waiver

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of

at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate as to --

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not

eligible or selected for the program."

STATEMENT OF THE CASE

Petitioners are all over age 40 and were employed by Lomas Information Systems, Inc. ("Lomas") in various capacities until they were terminated on May 3, 1993. They were called into a mass meeting on that date and told that the Company was experiencing financial problems which made it necessary to reduce the work force and that their jobs were being eliminated. They were also told in the meeting that if they signed releases (which were then handed to them), they would be paid certain severance benefits. The releases were General Releases, releasing any and all claims that they might have against Lomas "...including, but not limited to, rights under federal, state or local laws prohibiting discrimination,...."

Lomas made no attempt to comply with the terms of the OWBPA - Specifically, Petitioners were not given time to consider the releases nor was it sug-

gested that they counsel with an attorney; they were told nothing about other employees being laid off as required; nor was "age discrimination" specifically released. The Petitioners thereupon signed the General Releases and were paid the Company's standard severance benefits. Such severance benefits were calculated based upon the employee's level of compensation and years of service only. Thus, employees who were over the age of forty (40) received no additional compensation for their alleged release of their potential age discrimination claims.

Several months later Petitioners began to see ads run by Lomas, seeking employees for positions identical to those they had held. Petitioners responded to such ads, but they were not rehired - in fact, they were never even contacted by Lomas in response to their applications. Thereafter, Petitioners filed age discrimination Charges with the EEOC contending that Lomas had discriminated against them because of their age in selecting them for termination and, in addition,

that Lomas has refused to rehire them because of their age. Within the appropriate time, they filed suit alleging age discrimination in connection with their terminations and age discrimination as a result of Lomas' refusal to rehire them. They alleged that the releases were void and did not preclude either of their claims. They also sought a Declaratory Judgment as to what amount, if any, of their severance payment was paid to them for the release of their age discrimination claims in order to tender that amount (if any) to Lomas.

Shortly thereafter, Lomas filed a Motion to Dismiss or, alternatively, a Motion for Summary Judgment contending that Petitioners had ratified the terms of the releases by failing to return the full amounts received and that all of their claims were thus barred.

I. **Decision of the Trial Court**

The Trial Court, relying on the Fifth Circuit's decision in *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993) *cert. denied*, 115 S.Ct. 1403 (1995) held that even though the releases were

insufficient to satisfy the requirements of the OWBPA, they were merely "voidable" and that the retention of benefits under the releases amounted to a ratification thereof by Petitioners. The Trial Court noted that the Petitioners had sought a Declaratory Judgment with regard to what portion of their severance payments, if any, related to the release of their age discrimination claims and offered to refund that portion to Lomas. However, the Court concluding that Petitioners request for such a determination was insufficient and that Petitioners were obligated "to return the parties to the positions that they held just before they entered into the agreement" by returning all funds received, in order to avoid ratification of the defective releases. The Trial Court noted the conflict between the Circuits with regard to the effect of releases that do not comply with the OWBPA, but held that it was required to follow the Fifth Circuit decision in *Wamsley*.

The Trial Court's Opinion did not address Petitioners' claim that they were victims of age discrimina-

tion in Lomas' failure to rehire them, however, it entered a summary judgment dismissing all their claims.

II. **The Fifth Circuit's Decision**

Petitioners timely and properly appealed to the Firth Circuit complaining that:

1. The releases failed to comply with any of the statutory requirements and, thus, were so defective that they were void and could not be ratified;

2. The *Wamsley* case was distinguishable because the company there had attempted to follow the OWBPA, whereas no such attempt was made by Lomas;

3. There cannot be a valid present release of discrimination clams that arise in the future, such as Petitioners' claim of Lomas' discriminatory failure to rehire them;

4. Declaratory relief should have been granted advising the amount of consideration, if any, that related to the age discrimination claim; and

5. The issue of "knowing and voluntary" is a fact issue that must be decided by a fact finder.

The Fifth Circuit recognized that there was no attempt by Lomas to comply with the OWBPA, as had occurred in the *Wamsley* case, but held that such decision applied in any event and that Petitioners had the burden to prove recission of the releases. The Court stated:

> "To properly rescind the contract, the employees had to meet two burdens. Initially, they had to restore the status quo ante. *Grillet*, 927 F.2d at 220. Secondly, their rescission had to occur shortly after the discovery of the alleged deficiency. *Id.* at 221. In this case, the employees did neither. They made only a belated tender, after suit was filed, to return that part of the severance pay that was attributable to age discrimination claims. (fn.2) This offer not only fails to return the status quo, but by any standard is untimely. (fn. 3) *See Id.* at 220-21. As a result, the employees have ratified the release." (p.485)

With regard to the claim that Lomas failed to rehire them because of their age, the Court concluded:

> "This argument, however, is unpersuasive because the rehiring claim is not a future claim.... The employees' cause of action for failure to rehire is simply an attempt to revive claims that they were paid to release. Any claim concerning failure to rehire certainly arises out of their termination and was extant when the release was ratified."
> (p. 485)

No authority whatsoever was cited by the Court for the conclusion that a release signed in May 1993 could validly release the claim of Lomas' failure to rehire, which arose months later! The Court thus affirmed the Trial Court's grant of summary judgment in favor of Lomas.[1]

III. **The Validity of Non Complying Releases of Existing ADEA Claims**

In *Wamsley*, the Fifth Circuit took a dramatically different approach than that previously taken

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[1] After the date of the Fifth Circuit's decision, Lomas filed for bankruptcy under Chapter 11 of the Bankruptcy Act. Petitioners were advised by the Clerk of the Court that the 90 day requirement for filing this the Petition is probably not stayed and, accordingly, it is being filed. Petitioners are also filing a Motion to Lift Stay with the Bankruptcy Court.

by the Seventh Circuit in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993). In *Oberg*, the Court concluded that Congress meant what it said when it passed the OWBPA and rejected the same ratification argument made by Respondent in this case. The *Oberg* Court held that the monies received under an invalid waiver would simply become an offset from any amount recovered as damages in the age discrimination case. Further, no money was required to be returned before the discrimination case was adjudicated.

By contrast, the Fifth Circuit in *Wamsley* concluded that Congress did not intend to make such releases void, but only voidable. Having reached this conclusion, it then proceeded to apply common law principles and concluded that the plaintiffs in *Wamsley* intended to and did ratify the releases and that such precluded their subsequent suit. It was obvious in *Wamsley* that the releases tracked the requirements of the OWBPA and that the plaintiffs re-

ceived all of the notices and information required by that Act. The only dispute was whether or not they had actually received the full amount of the time required for consideration of the releases.

The present case dramatically illustrates the error of the Fifth Circuit's approach in *Wamsley*, which effectively nullifies the statute! As Lomas has demonstrated, there is simply no longer a need for an employer to even attempt to comply with the Statute. The employer can have General Releases executed and then wait and see if the employees seek to meet their burden by taking the prescribed steps to rescind. There is no need for an employer to go through the arduous process detailed by Congress in the OWBPA.[2]

The Fifth Circuit's approach is totally in conflict with this Court's explanation in *Lorillard v. Pons*,

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[2] As noted by the Fifth Circuit, there was an admission in the record that Lomas was aware of the OWBPA and consciously decided to ignore it. See, fn. 4. (A-10)

98 S.Ct. 866 (1978), explaining the enactment of the Age Discrimination in Employment Act ("ADEA") as a part of the Fair Labor Standards Act ("FLSA"). There, the Court noted that the ADEA was included as a part of the FLSA and the "powers, remedies and procedure" of the FLSA were to apply to violations of the ADEA. (p. 870) Since it was included as a part of the FLSA, its remedies and procedures were unlike the procedures set forth in Title VII of the Civil Rights Act.

Under the FLSA, it had consistently been held that employees could not waive their right to statutory benefits - overtime, minimum wage and liquidated damages. *Brooklyn Savings Bank v. O'Neal* 324 U.S. 697 (1945). In *O'Neal*, this Court stated that to allow a waiver of the payment of minimum wages, overtime, and liquidated damages would nullify the purposes of the Act. The Court later confirmed this and held that the payment of overtime amounts due in exchange for a release of additional

liquidated damages was not binding as to such liquidated damages, as same would defeat the Congressional intent. *Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925 (1946). The statute was subsequently amended to allow employees to validly waive and settle such claims if such waiver was supervised by the Secretary of Labor. 29 USC Sec. 26(c) After the enactment of the ADEA, its inclusion in the FLSA (and this background regarding unsupervised waivers) led to much litigation over the validity of typical ADEA releases.[3] Ultimately, the Appellate Courts held that such unsupervised releases were valid only if they were "knowing and voluntary". However, the definition of this term varied somewhat from Court to Court.

In 1987, the EEOC, following these cases, attempted to propound a rule that a release that was

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[3] See, Release and Waiver of ADEA Rights and Claims, 5 ABA, The Labor Lawyer, 739 (1989) containing a detailed discussion of the history of these issues and relevant authorities through the date of the Article.

"knowing and voluntary" would be permitted without EEOC approval or supervision if it did not provide for a release of prospective rights and claims, and was in exchange for additional benefits to which the employee was not otherwise entitled. 52 Fed. Reg. 32, 293. The EEOC Rule would have also required: (1) that the release specifically waive ADEA rights, (2) a reasonable time for employee deliberation, and (3) encouragement of the employee to consult an attorney. The EEOC's proposed Rule was suspended, however, by the Senate in an appropriation bill (H.R. 2763) for the fiscal year 1988 which criticized the Rule because it allowed unsupervised releases.[4]

The suspension of the Rule continued in 1989, as Congress set out to enact its own, more stringent requirements for unsupervised releases. Clearly, the legislation which was ultimately passed, the OWBPA, did precisely that. It is apparent that Congress

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[4] 5 ABA, The Labor Lawyer, *supra* @ 781.

mandated that employers do certain things and bring certain information to employees before they are asked to sign releases. These requirements are conditions precedent to a valid release and there is no hint that they can be "cured" by the employees' inaction or that the burden somehow shifts to employees to rescind them. Such a shift is completely inconsistent with the history of releases under the FLSA and the background that led to the OWBPA. The required information - provided in advance - and the notice to consult with an attorney was the substitute for the "supervision" otherwise required to be provided by the Secretary of Labor in order to validate releases of rights under the FLSA. The Fifth Circuit's logic would say that an unsupervised release of typical FLSA wage or overtime claims can be "ratified" and the employee has the burden of proving the recission of the unsupervised release! This is contrary to 50 years of settled law! See, e.g. *Mar-*

shall v. R. & M. Erectors, Inc., 429 F. Supp. 771 (D. Del. 1977) collecting cases @ 780.

The Congressional intent in the OWBPA was not to depart from the traditional holdings under the FLSA, but was to uniformly define what information, made available to an individual in advance, would apprise him of his rights, and such an executed release would be valid. The reverse must likewise be true - releases that do not comply would not be valid. Such had always been true under the FLSA. To attribute some lesser intent to Congress is to ignore the history of the ADEA as a part of the FLSA and the events that led to enactment of the OWBPA.

This is not to say that any defect, no matter how small, would nullify a release. Courts have always had the power to adopt a reading of a statute that avoids harsh or absurd results. *In Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 98 S.Ct. 2053 (1978) @ 2061. The *Wamsley* case itself is a good example of substantial compliance by a com-

pany with the intent of the Statute. In that case, the Fifth Circuit reached the right result, but for the wrong reason. The instant case is a good illustration of why the "ratification" theory is wrong and should not be applied - it effectively repeals the Statute!

The approach used by the Seventh Circuit in *Oberg* (which gave effect to the Statute, but did not ignore the amount paid) was recently used by this Court in response to a claim that after-acquired evidence of an employee's wrongdoing should constitute a total bar to recovery for age discrimination. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995). The Court there recognized that the remedial nature of the ADEA was furthered "when even a single employee establishes that an employer has discriminated against him or her" (p. 885) and concluded that a total bar to all relief for earlier age discrimination would "not accord" with the purposes of the ADEA. (p. 889) The Court thus ruled that the alleged wrongdoing by the employee

would be taken into account in determining the nature and amount of any relief awarded. The same approach should be used with regard to totally defective ADEA releases!

IV. **The Validity of Releases of Future Discrimination Claims**

The OWBPA specifically mandates that valid releases must not relate to future claims, stating that a waiver may not be considered "knowing and voluntary" unless:

> "(c) the individual does not waive rights or claims that may arise after the date the waiver is executed."

The Courts have clearly recognized that a discriminatory refusal to hire is a separate cause of action from a discriminatory termination. In *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067 (11th Cir. 1990), the defendant contended that there could be no cause of action by laid off employees for failure to hire, because it had no recall policy. the Court replied:

> "It is irrelevant whether the hiring is for the first time or the second time, pursuant to a recall policy or independent of such a policy. Title VII applies equally to those with an existing employment relationship (on-the-job discrimination), those with a past employment relationship (laying-off and refusing to rehire pursuant to a rehiring plan) and those with no employment relationship at all (refusal to hire a new employee or a laid off employee with no right or expectation of being rehired)." (p. 1071)

The separate nature of a cause of action based on a discriminatory failure to hire has been recognized in numerous situations. See, for example, *Anderson v. Post/Newsweek Stations*, 58 FEP Cases 423 (D. Conn. 1992); *EEOC v. Halls Motor Transit Co.*, 789 F.2d 1011 (3rd Cir. 1986); *Ray v. First Natl. Bank*, 56 FEP cases 501 (N.D. Ill. 1991). (While these are not age discrimination cases, they make clear the separate nature of a cause of action based on termination from a cause of action based on discriminatory hiring). It is crystal clear that Petitioners were qualified (they had previously held these jobs) and had a right to be considered for Lomas' job

openings, free from discrimination because of their ages. As stated by the Eleventh Circuit, this right was totally independent of whatever considerations were used by Lomas in selecting them for lay-off.

Congress recognized this distinction and in the OWBPA specifically forbade any attempt to release future claims - knowing that otherwise some employers would attempt to do exactly what Lomas has now accomplished! In doing so, Congress was following this Court's holding in *Alexander v. Gardner-Denver Company*, 94 S.Ct. 1011 (1974) which declared invalid any prospective waiver of Title VII claims. (p. 1021)[5]

There can be no question but that the Fifth Circuit's holding that: "Any claim concerning failure to rehire certainly arises out of their termination and was

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[5] In Alexander, the Court also held that the common law doctrine of "election of remedies" did not apply to a statutory cause of action. The doctrine of "ratification" is a common law cousin of "election of remedies" and it should receive the same treatment.

extant when the release was ratified" is contrary to this Court's decision in *Gardner-Denver*, many other authorities, and the OWBPA.

REASONS FOR GRANTING THE WRIT

1. Conflicting Interpretations Between The Circuit Courts On Ratification Of ADEA Releases

The Seventh Circuit in *Oberg* squarely held that a release that did not comply with the OWBPA was void, but that the consideration received by the claimant would constitute an offset to any damages awarded. Immediately thereafter, the Fifth Circuit held just to the contrary in *Wamsley*, that the release was not void, could be ratified, and such was a total bar to recovery. The *Oberg* Court drew from this Court's decision in *Hogue v. Southern R. Co.*, 88 S.Ct. 1150 (1968) which rejected state common law approaches and applied a similar offset against damages with regard to releases executed under the FELA. On the other hand, the Fifth Circuit concluded that the ADEA, unlike the FELA, was not a

remedial statute, and that Congress intended to make non-complying releases merely "voidable" and that common law theories did apply.

The Seventh Circuit has continued to follow its *Oberg* decision. See *Fleming v. U.S. Postal Service*, AMF O'Hare, 27 F.3d 259 (7th Cir. 1994) @ p. 261. The Court again concluded that the Statute replaced the common law rules relied on by the Fifth Circuit. Other Circuits have not yet voted on the issue, but District Courts in both the First and Fourth Circuits have, and both Courts sided with the Seventh Circuit and criticized the Fifth Circuit's *Wamsley* holding. See *Soliman v. Digital Equipment Corp.*, 869 F.Supp. 65 (D. Mass. 1994); *Blistein v. St. John's College*, 860 F.Supp. 256 (D. Md. 1994). Of course, the District Court in the present case followed the Fifth Circuit.

This is an important area of the law that is presently in chaos and sharply differing results occur depending solely upon where the claimants happen to be employed. The Equal Employment Opportunity

Commission is presently attempting to issue guidance to its field offices on such ADEA waivers and has established a Study Committee to make recommendations to it. See, 60 Fed. Reg. 54207. It is obvious that, under the present conflict of decisions, the EEOC cannot issue uniform guidance to its field offices across the nation regardless of this Committee's recommendations. The EEOC would have to publish two different sets of rules for the states under the jurisdiction of the Seventh and the Fifth Circuits and, with regard to the other states, it would seem that no definitive guidance could be given. It is essential that this Agency and employers and employees across the country know whether or not employers must follow (or ignore) the Statute in order to obtain valid releases of ADEA claims. In the ABA labor law article previously cited, the author referenced a Department of Labor study that estimated that 50% of persons seeking employment were impacted by age discrimination. (p. 742) The num-

ber of terminated employees impacted by the ADEA must likewise be sizeable. Thus, the correct interpretation of this Statute is of concern to a large segment of working America.

2. **The Fifth Circuit's Holding That ADEA Rights Can Be Prospectively Released Conflicts With The Rulings Of This Court And With Other Circuits**

This Court announced in *Alexander v. Gardner-Denver*, *supra*, that there could be no prospective release of Title VII rights. This concept has been consistently applied by the Circuit Courts. See, *EEOC v. Beverage Containers*, *supra*, and it was specifically included in the OWBPA by Congress. The Fifth Circuit has totally departed from this and allowed Lomas to obtain a release from discriminatory acts that it had not yet committed at the time the releases were signed. This is a dangerous precedent that could undermine all the nation's anti-discrimination laws and it should be reversed. For example, an employee could be asked to sign a re-

lease from discrimination claims at the time of employment and then could be found to have later "ratified" same by his or her continued employment.

CONCLUSION

It is undisputed that in passing the OWBPA, Congress intended to make the standards uniform across the nation as to what must be done by an employer in order to obtain create a valid release of ADEA claims. Instead, the present state of affairs represents a giant step backward and greater conflict exists than when Congress passed the OWBPA. The Fifth Circuit's "ratification" doctrine completely nullifies the Statute - as demonstrated by the facts in this case. The additional ruling of the Fifth Circuit, that statutory rights can be prospectively released by subsequent "ratification" is grossly wrong and, if followed, could undermine 30 years of effort by Congress and the Courts to eliminate discriminatory employment practices.

Respectfully submitted,

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APPENDIX

TOM BLAKENEY, MICHAEL BLOHM, ROBERT S. HUFFER, ERIN PHELPS, JAMES RUSKA, LINN MADSEN, KATHY HOWELL, and MIKE SWEET,

Plaintiffs-Appellants,

v.

LOMAS INFORMATION SYSTEMS, INC.

Defendant-Appellee.

NO. 95-10319

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Oct. 4, 1995

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

BEFORE KING, SMITH AND BENAVIDES, CIRCUIT JUDGES.

BENAVIDES, CIRCUIT JUDGE:

The central issue of this summary judgment appeal is whether former employees ratified a release waiving all discrimination claims against their former employer thereby precluding later suit for age discrimination. Concluding that they have, we affirm the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 1993, appellee Lomas Information Systems, Inc. ("Lomas") terminated appellants Tom Blakeney, Michael Blohm, Robert S. Huffer, Erin Phelps, James Ruska Linn Madsen, Kathy Howell, and Mike Sweet (collectively "**the employees**"). In accordance with Lomas's 1993 Reduction in Force Program, each employee was entitled to severance benefits as consideration for signing a document entitled "**General Release**." This release included a broad waiver of all discrimination claims.[6] Each employee voluntarily

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[6] The release provided as follows:

As a material inducement to Lomas . . . to enter into this General Release, [this employee] hereby irrevocably and unconditionally releases, acquits and forever discharges the Company . . . from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, losses, debts and expenses . . . of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not limited to, rights under federal, state or local laws prohibiting discrimination, claims, growing out of any legal restrictions on the Company's right to terminate its employees . . . which . . . [this employee] now has, owns or holds, or claims to have owned or held, or

signed the release and received the appropriate severance pay.

Despite having signed the release specifically waiving all discrimination claims, the employees subsequently filed charges of unlawful age discrimination with the Equal Employment Opportunity Commission. On July 18, 1994, the former employees sued Lomas alleging that they were victims of age discrimination when Lomas terminated them and when the company failed to rehire them. To escape the effect of the release, the employees alleged that it had no force because it failed to comply with the provisions of the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. § 626(f)) ("**OWBPA**").

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which . . . at any time heretofore had owned or held, or which [this employee] at any time hereinafter may have owned or held or claimed to have owned or held against each of any of the Releases. As consideration for this General Release, the Company agrees to pay [this employee] the sum of [payment amount] (less deductions) as severance pay. . . . The employee enters into this General Release with full knowledge of its contents and enters into this agreement voluntarily.

In the district court, Lomas moved for summary judgment on the ground that the employees waived their right to sue by signing the release and retaining their severance benefits. The district court agreed and granted summary judgment for Lomas on that basis. The court concluded that the release, while failing to meet the requirements of the OWBPA, created a voidable contract which the employees ratified by retention of the severance pay. The employees appeal contending primarily that failure to comply with the OWBPA precludes ratification of the release.

DISCUSSION

[1] We review the granting of a summary judgment de novo under well-established standards. *See Celotez Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Sterling Property Management, Inc. v. Texas Commerce Bank, Nat'l Ass'n*, 32 F.3d 964, 966 (5th Cir. 1994).

[2, 3] The OWBPA amended the Age Discrimination in Employment Act (**"ADEA"**) to enable an em-

ployer to enforce a waiver of age discrimination claims. *See* 29 U.S.C. § 626(f)(1). Section 626(f)(1) provides that an individual may not waive rights under the statute unless the waiver is "knowing and voluntary." To constitute a knowing and voluntary waiver, the release must meet specific statutory requirements such as specifically referring to the ADEA, advising the individual to consult with an attorney, and providing a grace period to consider signing the agreement. *See* 29 U.S.C. §§ 626(f)(1)(B), (E), (F)

It is undisputed that the release signed by the employees failed to meet these statutory requirements. The parties, however, disagree about the effect of this deficiency. Relying on our decision in *Wamsley w. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied, U.S.* 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), Lomas contends that the defective release was not void, but merely voidable at the employees' election. As such, the release could be subsequently ratified by failing to timely tender the consid-

eration on which the initial voidable contract was based. Confronted with this authority, the employees argue that *Wamsley* does not control because Lomas made no attempt to comply with the statutory requirements of section 626(f)(1).

[4, 5] We believe *Warnsley,* which is binding on this Court, does control the outcome of this appeal. In *Warnsley,* we held that failure to meet the requirements outlined in section 626(f)(1)(A)-(H) did not create a void contract, but merely a voidable one. 11 F.3d at 539. Failure to tender back the consideration for the promise not to sue, manifests an intention to be bound by the terms of the waiver. *Id.* at 540. This ratification creates a new promise and a new obligation that is enforceable despite the waiver's failure to meet the statutory requirements. *Id.* at 540 n. 11. While it is true that the *Wamsley* release contained the bulk of the requirements outlined in section 626(f)(1), our discussion of the voidability of the release did not hinge on substantial compliance with the OWBPA. Rather, it

was rooted in the fact that failure to comply with any of the waiver requirements merely renders the release not "knowing and voluntary" as required by the statute. Such defective waivers "are subject to being avoided at the election of the employee." *Id.* at 539; *see Wittorf v. Shell Oil* Co., 37 F.3d 1151, 1154 (5th Cir. 1994). Substantial compliance is not a prerequisite. A waiver either meets all the requirements of section 626(f)(1) and is valid under the OWBPA, or it fails to meet the requirements and is voidable. In this case, the release failed to meet the statutory requirements and was therefore voidable.

[6-9] The employees, however, did not exercise this option. Instead, they chose to keep the benefit of their bargain, the severance pay. Retaining the consideration after learning that the release is voidable constitutes a ratification of the release. *WittorJ;* 37 F.3d at 1154; *Grillet v. Sears, Roebuck* & Co., 927 F.2d 217, 220 (5th Cir. 1991). To properly rescind the contract, the employees had to meet two burdens. Initially, they

had to restore the status quo ante. *Grillet*, 927 F.2d at 220. Secondly, their rescission had to occur shortly after the discovery of the alleged deficiency. *Id.* at 221. In this case, the employees did neither. They made only a belated tender, after suit was filed, to return that part of the severance pay that was attributable to age discrimination claims.[7] This offer not only fails to return the status quo, but by any standard is untimely.[8] *See Id.* at 220-21. As a result, the employees have ratified the release.

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[7] In their complaint, the employees requested a declaratory judgment as to what part of the severance pay is attributable to the age discrimination claims. On appeal, the employees allege the district court erred by "refus[ing] to focus on this request." As we noted in *Grillet*, the employees had to tender the entire severance pay to properly rescind the waiver. 927 F.2d at 220. Based upon *Grillet*, there is no declaratory relief to which the employees are entitled.

[8] It is undisputed that to this day the employees have not returned the severance benefits to Lomas. Instead, the employees indicated to the district court that they were willing to tender only the amount judicially determined to be related to age claims. This incomplete tender offer came nearly twenty-two months after termination, eight months after filing suit, and seven months after Lomas's motion for summary judgment alerted them to the waiver defense. While we decline to prescribe a precise timetable for tender, we agree with

In an attempt to revive their lawsuit, the employees argue that the ratification of the release only applies to their termination claims and not their rehiring claims. According to the employees, because they cannot prospectively waive age discrimination claims, summary judgment was improper on the rehiring claim. This argument, however, is unpersuasive because the rehiring claim is not a future claim. In the release, the employees waived all rights to suit arising out of their termination. The employees' cause of action for failure to rehire is simply an attempt to revive claims they were paid to release. Any claim concerning failure to rehire certainly arises out of their termination and was extant when the release was ratified.

CONCLUSION

We conclude that the district court properly granted summary judgment because no genuine issue of material fact exists and Lomas is entitled to a judg-

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the district court, relying on *Grillet*, that "[t]his offer is simply too little, too late." 927 F.2d at 220.

ment as a matter of law.[9] As a matter of law, the employees ratified the release thereby waiving all claims of age discrimination. The summary judgment is **AFFIRMED**.

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[9] The employees also contend that there is a fact issue regarding whether their waiver was "knowing and voluntary." This assertion is based upon a hearsay statement contained in an employee affidavit that a personal officer of Lomas told the employee, who was terminated in 1992 unrelated to the reduction in force, that the release did not cover age discrimination claims. Since Lomas already concedes for purposes of summary judgment that the waivers were not knowing and voluntary, this alleged fact issue is immaterial.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TOM BLAKENEY, ET AL.,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**CIVIL ACTION NO.**
	§	
LOMAS INFORMATION SYSTEMS, INC.,	§	**3:94-CV-15252-G**
	§	
Defendant.	§	

MEMORANDUM ORDER

Before the court is the motion of defendant Lomas Information Systems, Inc. ("**Lomas**") for dismissal of the claims of plaintiffs Tom Blakeney, Michael Blohm, Robert S. Huffer, Erin Phelps, James Ruska, Linn Madsen[10], Kathy Howell, and Mike Sweet (collectively, "**the plaintiffs**") under Rule 12(b)(6) or,

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[10] Linn Madsen is referred to as both "Linn Madsen" and "Barbara Cowick" in her employment records with Lomas. Defendant's Unopposed Motion to Clarify the Summary Judgment, Exhibit A.

alternatively, for summary judgment under Rule 56(c). For the reasons stated below, Lomas's motion for summary judgment is granted.

I. BACKGROUND

This case involves the plaintiffs' claims that Lomas unlawfully discriminated against them on the basis of age. Lomas initiated its 1993 Reduction in Force Program (**"the Program"**) on January 1, 1993, as a result of which the plaintiffs were terminated. Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment and Brief in Support Thereof (**"Defendant's Motion"**), Exhibit 1. On May 3, 1993, Lomas discharged the plaintiffs and provided them with a document entitled General Release. This release included a broad waiver of all claims against Lomas. The release provided that payment to the plaintiffs under the Program constituted consideration for the release.[11] Each of the plaintiffs signed a General Release

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[11] The notice included, in relevant part, the following provisions:

> As a material inducement to Lomas . . . to enter into this General Release, [this employee] . . . hereby irrevocably and unconditionally releases, acquits and forever discharges the Company . . . from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, losses, debts and expenses . . . of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not limited to, rights under federal, state or local laws prohibiting discrimination, claims growing out of any legal restrictions on the Company's right to terminate its employees . . . which . . . [this employee] now has, owns or holds, or claims to have owned or held, or which . . . at any time heretofore had owned or held, or which this employee] at any time hereinafter may have owned or held or claimed to have owned or held against each of any of the Releases.
>
> As consideration for this General Release, the Company . . . agrees to pay [this employee] the sum of [payment amount] (less deductions) as severance pay .... The employee enters into this General Release with full knowledge of its contents and enters into this agreement voluntarily .

See, e.g., Defendant's Motion, Exhibit 2.

and, in return, Lomas paid each plaintiff severance benefits in accordance with the Program.[12]

After signing the General Release, each plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("**EEOC**") in which it was claimed that his or her termination resulted from unlawful age discrimination. On July 18, 1994, the plaintiffs filed this suit in which they claim that they were victims of age discrimination (1) when Lomas terminated them, and (2) when Lomas failed to rehire them. Plaintiffs' Original Complaint ("**Complaint**") at 3-4. Plaintiffs further allege that the releases they signed are void because of Lomas's failure to comply with the

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[12]

Plaintiff	**Severance Pay**
Tom Blakeney	$ 8,820.51
Michael Blohm	21,783.01
Robert Huffer	12,990.00
Erin Phelps	8,750.00
James Ruska	7,166.66
Linn Madsen	4,176.66
Kathleen Howell	16,398.62
Michael Sweet	8,371.66

Older Workers Benefit Protection Act ("**OWBPA**"), 29 U.S.C. § 626(f).

II. ANALYSIS

A. Evidentiary Burdens on Motion for Summary Judgment

Lomas has styled its motion as both a motion to dismiss and a motion for summary judgment. Because the court has considered matters outside the pleadings, the motion will be construed as one for summary judgment. *See* Fed. R. Civ. P. 12(b)(6).

Summary judgment is proper when the pleadings and evidence on file demonstrate that no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A movant for summary judgment must inform the court of the basis of its motion and identify the portions of the record which reveal there are no genuine material fact issues to support the nonmovant's case. *Celotex Corporation v. Catrett,* 477 U.S. 317, 323 (1986). "The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains." *Grillet v. Sears, Roebuck & Company,* 927 F.2d 217, 220 (5th Cir. 1991) (citing *Celotex,* 477 U.S. at 322-23); *see also* Fed. R. Civ. P. 56(c).

Once the movant makes this showing, the nonmovant must direct the court's attention to evidence in the record demonstrating the existence of a genuine issue of material fact for trial. *Celotex,* 477 U.S. at 323-24. The nonmovant must present evidence sufficient to support a resolution of the factual issue in his or her favor. *Anderson,* 477 U.S. at 257. All of the evidence, however, must be viewed in a light most favorable to the motion's opponent. *Id.* at 255 *(citing Adickes* v. *S.H.*

Kress & Company, 398 U.S. 144, 158-59 (1970)). Parties may not use conclusory allegations as evidence to support or defeat a motion for summary judgment. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied, U.S.* , 113 S. Ct. 82 (1992).

Summary judgment is properly entered against a party if after adequate time for discovery, the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23; Fed. R. Civ. P. 56(e).

B. The OWBPA

The basis of the summary judgment motion is that the plaintiffs have waived their right to bring suit as a result of the General Release they signed and the severance benefits they received. The effect of the releases signed by the plaintiffs requires an analysis of the Fifth Circuit law interpreting the OWBPA.

The Age Discrimination in Employment Act of 1967 ("ADEA") entitles a party to bring a civil action

against an employer for age discrimination. 29 U.S.C. § 626(c)(1). The OWBPA amended the ADEA in 1990. Congress enacted the OWBPA to enable an employer to enforce an ADEA waiver, unsupervised by the EEOC, if the waiver is "knowing and voluntary" when executed. S. REP. No. 263, 101st Cong., 2d Sess. 31 (1990). To accomplish this goal, Congress enacted stringent statutory requirements that must be satisfied for an ADEA waiver to be considered knowing and voluntary. *Id.* at 33-34.

1. **Statutory Requirements for a Knowing and Voluntary Waiver**

The OWBPA applies to group termination programs such as the Program in this case. *Id.* at § 626(f)(1)(H). Under the OWBPA, an individual may not waive a right or claim arising under the ADEA unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). The OWBPA lists specific requirements that must be met before a waiver or a release of an ADEA claim or right can be considered knowing and volun-

tary. *See* 29 U.S.C. §§ 626(f)(1)(A)-(H) (listing requirements); *Williams v. Phillips Petroleum Company*, 23 F.3D 930, 936 (5th Cir.), *cert denied*, ___ U.S. ___, 115 S.Ct. 582 (1994).

Plaintiffs argue that the specific requirements of the OWBPA were not met in this case, so that the General Release is void. Specifically, plaintiffs allege, (1) the General Release did not directly mention the ADEA, (2) plaintiffs were not given sufficient time to consider the General Release, (3) they were not given an option to revoke the General Release, and (4) they were not advised to consult with an attorney, all in violation of the OWBPA. Complaint at 5. Lomas does not dispute that the General Release was not in compliance with the OWBPA. Defendant's Motion at 2.[13] In

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[13] Former Lomas employee William E. Beran stated that a Lomas human resources manager knew that the General Release did not comply with the OWBPA. Plaintiffs' Opposition to Defendant's Motion to Dismiss and for Summary Judgment, Affidavit of William E. Beran, Exhibit A. Whether Lomas had knowledge of the OWBPA and its requirements is immaterial, however, to the analysis of this motion.

fact, the waiver used by Lomas was clearly deficient on several grounds, including its failure to refer specifically to age discrimination claims and its failure to advise in writing to consult an attorney. 29 U.S.C. § 626(f)(1)(B), (E).

Although the plaintiffs are correct that the General Releases did not meet OWBPA requirements, this deficiency does not render them void. Indeed, the Fifth Circuit has explicitly held that "defective waiver agreements (i.e., waiver agreements not in compliance with the OWBPA) are voidable and not void." *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993). Thus, although the General Releases here are insufficient to satisfy the requirements of the OWBPA, this merely makes them voidable. Waivers that are not knowing and voluntary are "subject to being avoided at the election of the employee." *Id.*

2. Ratification of Waivers by Retention of Benefits

Even though the waivers here were presumptively not knowing and voluntary, they -- together with any accompanying releases -- are nevertheless enforceable if ratified by the employee. *Wittorf v. Shell Oil Company,* 37 F.3d 1151, 1154 (5th Cir. 1994). ~[N]either the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Wamsley,* 11 F.3d at 539-40. "[If] employers [were] forced to assume the risk that noncompliance with all of [the] statutory requirements of [the OWBPA rendered a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions." *Id.* at 539.

A waiver can be ratified by the employee's failure to tender back to the employer severance benefits received in exchange for execution of a waiver. *Grillet,* 927 F.2d at 220. Ratification of a waiver, even if the waiver does not comply with the OWBPA, precludes a

subsequent age discrimination suit against the employer. *Id.* XA person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration" upon learning of the invalidity of the release. *Williams,* 23 F.3d at 937. "When [employees] [choose] to retain and not tender back to [the employer] the benefits paid them in consideration for their promise not to sue [the employer], they manifest[] their intention to be bound by the waivers and thus, [make] a new promise to abide by their terms." *Wamsley,* 11 F.3d at 540 (citing *Grillet,* 927 F.2d at 220; *O'Shea v. Commercial Credit Corporation,* 930 F.2d 358, 362 (4th Cir. 1991); *In re Boston Shipyard Corp.,* 886 F.2d 451, 455 (1st Cir. 1989); *Anselmo v. Manufacturers Life Insurance Company,* 771 F.2d 417, 420 (8th Cir. 1985)).

Lomas argues that even if the General Releases were unenforceable at the time of their execution, the plaintiffs subsequently ratified their severance agreements by failing to return their severance pay after

learning the General Releases were invalid. Defendant's Motion at 4.[14] The court is persuaded by this argument .

Although the plaintiffs offered to tender back all or part of their severance payments to revive their ADEA claims, such a belated tender is "simply too little, too late." *Grillet,* 927 F.2d at 220. A tender is inadequate if it is untimely. *Id.* at 221. The plaintiffs still have not returned the payments more than six months after they filed suit. Tendering a severance payment back to the employer only upon the court's endorsement of the plaintiffs' ADEA claims[15] is not a timely revocation of the waiver.[16] Furthermore,

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[14] Apparently, none of the plaintiffs has returned his or her severance pay to Lomas. Defendant's Motion, Affidavit of Tamara Wright, Exhibit A at 2. Upon filing their complaint, however, the plaintiffs (who do not dispute that they have not returned the severance payments) offered to refund the portions of their severance pay that are attributable to the release of ADEA claims. Complaint at 5.

[15] "Plaintiffs seek declaratory judgment of the Court determining what portions of the consideration, if any, was paid by [Lomas] for the release of such ADEA claims and what amounts, if any, are due to be re-

for effective rescission, the plaintiffs are obligated to return the parties to the positions they held just before they entered into the agreement." *Grillet*, 927 F.2d at 220 (citing *Texarkana Trawlers*, 846 F.2d at 304). The plaintiffs offered to return only that portion of their payments which pertain to their ADEA claims; clearly, therefore, they have not offered to restore the parties to their respective positions before the General Releases were executed.

The plaintiffs argue that the instant case is analogous to the Seventh Circuit decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert.*

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funded to [Lomas] in order for Plaintiffs to pursue their ADEA claims." Complaint ¶ X.

[16] For the plaintiffs to have revoked the waivers, they would have had to seek rescission "shortly after discovering the misrepresentation." *United States v. Texarkana Trawlers*, 846 F.2d 297, 305 n.20 (5th Cir.), *cert. denied*, 488 U.S. 943 (1988). Although it is unclear exactly how long the plaintiffs could have waited, it is clear that they have waited far too long in this instance. At the very least, the plaintiffs would have to had to return their severance benefits shortly after consulting an attorney about the possibility of bringing a claim for age discrimination.

denied, ____ U.S. ___, 114 S.Ct. 2104 (1994) (holding that severance agreement that did not meet OWBPA requirements were not ratified by employees refusing to tender back consideration). At least two district courts have followed *Oberg* in holding that employees cannot ratify a waiver when the waiver does not meet the requirements of the OWBPA. *See, e.g., Soliman v. Digital Equipment Corporation*, 869 F. Supp. 65, 68-69 (D. Mass. 199); *Blistein v. St. John's College*, 860 F. Supp. 256, 262 (D. Md. 1994). The Fifth Circuit, however, has directly rejected the holding in *Oberg*. *Wamsley*, 11 F.3d at 540 n.11 (#[t]he court's conclusion in *Oberg* is at odds with the legislative history and congressional intent behind the OWBPA"); *see also Wittorf*, 37 F.3d at 1154 ("Even assuming that the Release and Settlement Agreement was defective . . ., the Agreement became voidable and not void."). This court concludes, consequently, that *Oberg is* not the law in this circuit.